

**REMARKS**

As noted above, the Office Action mailed November 15, 2004 has been carefully reviewed and considered. The undersigned Attorney respectfully responds for the Applicant as noted below.

On page 2 of the Office Action a correction to the specification has been requested to correct a typographical error in the reference to the prior application. The specification has been amended to correct this error as requested.

Also on page 2, claims 1, 9, 10 and 11 are rejected under Section 112, second paragraph, as being indefinite. In response each of these claims have now been amended in order to clarify the invention. In view of the amendments to the claims, in so far as the present rejection may be maintained with respect to any of the amended claims, reconsideration and withdrawal are respectfully requested.

On page 3 of the Office Action, claims 1-12 are rejected under section 103(a) as being unpatentable over Simms et al. (EPA 0145550) in view of Katta et al. (U.S. Patent No. 6,093,437).

As noted by the Examiner at the bottom of page 3 of the Office Action, Simms et al. (1) do not disclose the moisture content of the liquid sweeteners; (2) do not disclose the addition of barley flour, oat flour and or beta-glucan; and (3) do not disclose the ratio of such flour to wheat flour in the disclosed cookie dough.

The Examiner goes on, however, to note that Katta et al. discloses toaster cookies and, referring to a single example, that, "They teach to make healthy cookies by using barley flour that has a high beta-glucan content." The Examiner continues, noting that, "It would have been obvious to one skilled in the art at the time of the invention to replace a portion of the wheat flour with other flours such as the barley flour having a high beta-glucan content taught by Katta et al *when desiring to make a healthier version of cookies.*" (emphasis added)

In this regard, it is respectfully noted that the present inventors would not have considered Katta et al., because they were not motivated by a desire to make a healthier cookie and were not motivated to look for ingredients that would contribute to a healthier cookie product. Instead, the present inventors were motivated to find a flour that includes sufficient moisture scavenging to allow the present shelf-stable sweet goods dough to have sufficient moisture content to provide a suitable dough, while having a lowered water activity so that shelf-stability can be enhanced by minimizing water activity.

In this regard, it is respectfully submitted that the Applicants clearly indicated in the first paragraph in the Summary of the Invention (paragraph 0017 of the present application), that, "The present invention also includes sufficient moisture scavenging provided either by flour made from one of two specific grains that include high levels of beta-D-glucans or a mixture of the same. These grains are oats and barley."

In view of this statement in the first paragraph of the Summary of the Invention, it is respectfully submitted that it is clear that the inventors motivation

was to include flour from barley, oats, or a combination thereof, in order will include beta-glucans to provide moisture scavenging activity. It is respectfully submitted that the inventors were not otherwise motivated.

It is respectfully submitted, therefore, that it is only with hindsight that the Examiner has first, carefully searched the Patent Office computer database records to find a reference in which the use of a key ingredient to the present invention was disclosed, and then, created an invention of his own by suggesting a motivation of his own for combining the newly found reference with Simms et al., namely that the combination product would be a healthier product. It will be appreciated, however, that the present inventors did not add barley flour, oat flour or beta-glucans to the present inventions to make the resulting product healthier, they added it to promote moisture scavenging and would not, therefore, have considered Katta et al.

As is evident from the disclosure in present application, barley flour, oat flour and beta-glucans are added to the present invention to retain moisture in a bound state, allowing a greater amount of moisture to be retained in the sweet goods dough of the present invention without increasing the water activity to a level where microbial proliferation might reduce the shelf-stability of the claim invention. It is respectfully submitted that this is not taught either by Simms et al. or by Katta et al.

In fact, it is respectfully submitted that Simms et al. teaches away from use of any flour that might absorb moisture when Simms et al. make their only statement about flours that might be used in their products, indicating, "The flour

should preferably be a low protein content flour, which typically has a protein content of about 6.0 to about 9.0% by weight to reduce imbibing of the water supplied by the corn syrups. Wheat flour is preferred but other flours conventionally used in the preparation of cookies can also be utilized in the present invention." (emphasis added; See at p.10; lines 22-28).

This statement clearly indicates that Simms et al. had no appreciation for the value of adding a beta-glucan containing flour that would improve the stability of the dough by doing exactly what Simms et al have taught that they do not want the flour to do, absorb water or act as a water scavenger. Given this teaching, it is not believed that one of skill in the art would then look for a flour that would improve moisture retention.

On page 4, the Examiner also notes that the proportion of flour used "depends upon the nutritional desired taken into consideration the taste, flavor and texture; one can readily determine the appropriate amount through routine experimentation to obtain product having satisfying, taste, texture, flavor and nutrition."

With all due respect of the position taken by the Examiner, it is once again respectfully noted that the inventors motivation to include barley flour, oat flour or a combination thereof was to provide water scavenging activity which is desired in the amounts provided by the present invention.

Therefore, because Simms et al. teach away from using a flour that will absorb water and because Katta et al. do not teach the value of using barley flour, oat flour or beta-glucans to act as a water scavenger in a dough product,

reducing available water and water activity, it is respectfully submitted that that there would be no motivation to combine Katta et al. with Simms et al. and that the *prima facia* case for obviousness of the present invention proposed by the Examiner is without merit because there is no teaching to combine and no motivation to combine Simms et al. with Katta et al. to form a dough that has greater moisture retention capabilities and also because Simms et al. teach away from such a combination.

In view of the foregoing, it is respectfully submitted that the claims are patentably distinct from any of the prior art now of record in the present application whether taken alone or in combination and reconsideration and withdrawal of the present rejections are respectfully requested. The undersigned Attorney respectfully submits that, unless other objections are noted, the claims are now in condition for allowance and a notification to that effect is earnestly solicited.

Enclosed herewith is a request for a one-month Extension of Time extending the time for response to the present office action from February 15, 2005 to March 15, 2005. The Office is requested to charge the fee to the Deposit Account 13-4300 for the Extension of Time and any other fees due with respect to the present response to assure that it is timely filed in the Patent Office.

The Examiner is respectfully urged to contact the undersigned Attorney at the number provided below if the undersigned Attorney can help resolve any remaining matters standing in the way of allowance of the present claims.

Respectfully submitted,  
for the Applicant  
by his Attorneys,

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